Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1685.

CBS INC.,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, et al.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT, NATIONAL BROADCASTING COMPANY, INC. IN OPPOSITION.

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BRIEF FOR RESPONDENT NATIONAL BROADCASTING COMPANY, INC. IN OPPOSITION.

OPINION BELOW.

The order of the Court of Appeals (App. 7a) is unreported. The opinion of the District Court which gave rise to the petition for mandamus is reported at 449 F. Supp. 127 (C. D. Cal., 1978) (App. 41a).

JURISDICTION.

The judgment of the Court of Appeals was entered on April 12, 1978 and petition for rehearing was denied on February 5, 1979. The petition for writ of certiorari was filed on May 7, 1979. Jurisdiction of this Court has been invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED.

Whether the Court of Appeals abused its discretion in denying a petition for writ of mandamus of a non-party directed at the discretionary decisions of the District Court in approving a consent judgment and in determining the procedures to be used in such approval.

STATEMENT.

National Broadcasting Company, Inc. ("NBC") files this brief in opposition to the petition for writ of certiorari filed by CBS Inc. ("CBS"), by which CBS challenges the order of the Court of Appeals for the Ninth Circuit denying CBS' petition for writ of mandamus. In its mandamus petition, CBS attacked the decision of the District Court approving a Final Judgment (App. 20a) (generally referred to herein as "the Consent Decree") terminating **United States v. National Broadcasting Company, Inc.**, Civ. No. 74-3601-RJK (C. D. Cal.).

The Consent Decree at issue settled an antitrust action commenced by the United States against NBC in December, 1974. CBS was not a party to this lawsuit; however, virtually identical actions simultaneously were filed against CBS and American Broadcasting Companies, Inc. ("ABC"), the other two major commercial television networks. **United States v. CBS Inc.**, No. 74-3599 (C. D. Cal.), **United States v. American Broadcasting Companies, Inc.**, No. 74-3600 (C. D. Cal).[1]

In the course of litigation, NBC and the Government entered into settlement negotiations. ABC and CBS did not negotiate or agree to a consent decree and the respective actions against them are proceeding to trial. NBC and the Government, however, were able to negotiate a settlement. The resulting Consent Decree was submitted to the District Court for approval on November 17, 1977.

In order to reach settlement, NBC agreed to accept various injunctive restrictions principally dealing with

1. Virtually identical predecessor suits had been dismissed without prejudice by the District Court because of plaintiff's failure to comply with discovery orders going to the question whether the suits were commenced with improper motive. **United States v. National Broadcasting Co., Inc.**, 65 F. R. D. 415 (C. D. Cal. 1974), *appeal dismissed*, 421 U. S. 940 (1975).

NBC's production and acquisition of programs. Nothing in the NBC Consent Decree places any restriction on CBS, which remains free to negotiate any term it desires with its program suppliers. CBS, of course, is also free to litigate the parallel antitrust suit brought against it by the Government, which CBS is vigorously doing.[2]

Pursuant to the Antitrust Procedures and Penalties Act ("APPA"), 15 U. S. C. § 16, the Government caused the proposed Consent Decree and a Competitive Impact Statement to be published in the Federal Register on November 24, 1976 (41 Fed. Reg. 51992 (1976)) and also caused a summary of the proposed Consent Decree and Competitive Impact Statement to be published in appropriate newspapers of general circulation during the period November 29-December 5, 1976.

Following the procedures under the APPA, 15 U. S. C. § 16(d), numerous Comments regarding the Consent Decree were received and considered. CBS itself provided the District Court with a filing of over 150 pages, including a 47 page set of Comments plus six appendices totalling an additional 107 pages. Included were extensive affidavits from a professor of economics, and a professor of law specializing in antitrust law.

CBS also moved to intervene in the District Court, relying on essentially the same arguments made in its Comments and, indeed, appending those Comments to its memorandum in support of its intervention motion. On

2. Furthermore, in negotiating the Consent Decree, the Government recognized that it would be unfair to place NBC "at a competitive disadvantage with respect to CBS or ABC. . . ." (Competitive Impact Statement, at 13). Thus, the restrictions on NBC's production and most of the restrictions on the terms that NBC could include in its contracts with program suppliers do not take effect unless and until similar restrictions are placed on ABC and CBS as a result of a consent decree or of the District Court's ruling upon completion of the respective cases against them, assuming, of course, that either of these results occurs (Section VII).

June 20, 1977, the District Court denied the CBS motion to intervene, holding that:

> —CBS lacked the requisite interest to intervene because, *inter alia*, the Consent Decree placed no restraints on CBS;
>
> —Any interest CBS might have would not be impaired, in light of CBS's ability to defend its parallel lawsuit and in light of the provision of the settlement which provided that many paragraphs of the NBC Consent Decree, including those most attacked by CBS, would not become effective unless the Government obtained similar remedies against CBS.[3]

(Memorandum of Decision and Order, June 20, 1977, at 7-8.)

After the parties had reviewed the Comments and after further discussions between them, on May 4, 1977, the Government and NBC filed a stipulation and proposed order modifying the proposed Final Judgment.[4] These modifications were explained by the Government in the *Memorandum of the United States Submitting Comments and Plaintiff's Responses Relating to the Final Judgment and Explaining Certain Changes in the Judgment*, filed May 4, 1977. This was published in the Federal Register on May 16, 1977 (42 Fed. Reg. 24995-25312 (1977)). On May 17, 1977, the Government filed a *Certificate of Compliance with the Provisions of the Antitrust Procedures and Penalties Act.*

3. See p. 3, n. 2, *supra.*

4. The May 4, 1977 stipulation deleted a provision dealing with pay cable and modified a provision dealing with pilots. In addition, the parties entered into a stipulation concerning talent and literary exclusivity arrangements, which were not and are not covered by the proposed Final Judgment, and agreed that the May 4 stipulation would not create an estoppel as to the subject matter of the deleted pay cable provision or as to talent and literary exclusivity.

On November 23, 1977, the District Court signed the proposed Consent Decree and on November 28, 1977, the Final Judgment was entered. The Court's opinion explaining its actions was filed on January 26, 1978 and entered on January 27, 1978.

In its opinion approving the Consent Decree, the District Court pointed out that the persons contesting the settlement, including CBS, had taken conflicting positions which the Court had considered "in light of the special interest of the respective proponents thereof." (App. 70a) This fragmented opposition to the settlement, the terms of which fell between the polarized positions of the commenting persons, and the fact that the Consent Decree was consistent with the relief sought in the Complaint (App. 77a), were among the factors which persuaded the District Court to approve the Consent Decree.

The District Court made clear that it had carefully considered all filings, including that of CBS. The Court concluded that, under the discretion explicitly afforded by the APPA, it could approve the Consent Decree without the need for a hearing or other optional procedures. (App. 76a)

On December 20, 1977, CBS filed a petition for a writ of mandamus in the United States Court of Appeals for the Ninth Circuit which essentially was based on the same arguments upon which CBS had relied in its motion for summary judgment in its own litigation,[5] in its Comments on the Consent Decree, and in its motion to intervene. The petition was denied on April 12, 1978, and rehearing was denied on February 5, 1979.

5. This motion was denied by the District Court on Feb. 9, 1977, *Memorandum of Decision and Order*, Feb. 16, 1977.

Argument.

I. THE COURT OF APPEALS PROPERLY DENIED THE PETITION FOR WRIT OF MANDAMUS.

The District Court's entry of a Consent Decree in this case was proper and the resulting denial of the writ of mandamus by the Court of Appeals does not warrant review. This Court has made amply clear that "the remedy of mandamus is a drastic one, to be invoked only in extraordinary circumstances." **Kerr v. United States District Court,** 426 U. S. 394, 402 (1976), and cases cited therein. No such extraordinary circumstances exist here.

The conditions which must be present before a writ of mandamus may issue were succinctly stated in **Kerr:**

> "As a means of implementing the rule that the writ will issue only in extraordinary circumstances, we have set forth various conditions for its issuance. Among these are that the party seeking issuance of the writ have [sic] *no other adequate means to attain the relief he desires,* [citations omitted], and that he satisfy 'the burden of showing that [his] *right to issuance of the writ is clear and indisputable.*' [Citations omitted.] Moreover, it is important to remember that issuance of the writ is in large part a matter of discretion with the Court to which the petition is addressed. [Citations omitted.]" *Id.* at 403 (emphasis added).

CBS fails to satisfy these requirements for two reasons. First, mandamus was not CBS's only means to contest the NBC Consent Decree. CBS has had available and has employed other means to seek the relief it desired. Indeed, CBS made virtually the same attacks on the Consent Decree that it makes here in even greater detail in its Comments and affidavits filed in the District Court.

CBS also moved to intervene in the District Court under F. R. Civ. P. 24(a) and (b). Here too, CBS made the very same attacks against the Consent Decree that it sought to make through its petition for mandamus. The District Court denied intervention and CBS appealed to the Ninth Circuit. Significantly, CBS's brief on that appeal, which is now pending, contains the same arguments made in the instant petition for certiorari.

Intervention, of course, provides a proper party with a mechanism to contest the settlement of a government antitrust case in the district court and to appeal the approval of such a settlement. The fact that CBS may not have been successful in its motion to intervene does not mean that it should be granted mandamus. Mandamus is neither an alternative remedy nor a cons lation prize for persons who have failed to demonstrate sufficient interest in a lawsuit to be allowed to intervene.[6]

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6. CBS suggests in its petition in this Court (p. 24 and note *) that certain, but not all, parties that may not intervene nonetheless are entitled to mandamus, apparently because although their interest is insufficient to make intervention appropriate, it is not so small as to prevent mandamus. CBS not surprsingly provides precious little definition as to which persons might fall into this presumably narrow middle ground category in future applications of the rule CBS propounds.

CBS cites **United States v. Sherman,** 581 F. 2d 1358 (9th Cir. 1978), for the proposition that mandamus has been considered a proper remedy, invocable by non-parties, in other cases. **Sherman,** however, involved a District Judge's order to the press not to discuss a terminated criminal case with jurors. A newspaper both appealed the judgment of the Court in the criminal action and sought mandamus. The Court of Appeals held explicitly that appeal was not a proper procedure to be invoked by a newspaper

The second requirement imposed by this Court is that a person seeking mandamus demonstrate that his right to issuance of the writ is "clear and indisputable." Yet the CBS petition for writ of mandamus attacks the *discretionary* decisions [7] of the District Court in considering and in approving the Consent Decree; and these exercises of discretion by the District Court are exactly what the writ of mandamus is designed *not* to cover:

> "Mandamus issues to compel an officer to perform a purely ministerial duty. It cannot be used to compel or control a duty in the discharge of which by law he is given discretion." **Work v. Rives,** 267 U. S. 175, 177 (1925).

On this ground alone, mandamus is improper.

Finally, **Kerr** makes clear that review is not warranted because the decision of the Court of Appeals in denying mandamus also is discretionary, 426 U. S. at 403.

6. (Cont'd.)
under these circumstances. Consequently, it became apparent that there was no other adequate source of relief. In the present case, however, CBS bases its appeal from denial of leave to intervene on precisely the same grounds that it seeks mandamus. Furthermore, the **Sherman** case involved a major First Amendment question, with no countervailing policy considerations.

Moreover, here CBS can show no restraint on its own activity. The Consent Decree limits NBC only. CBS is free to negotiate its own terms with suppliers and to litigate its own parallel lawsuit. Additionally, in large part the NBC Consent Decree does not take effect unless CBS, after suit or by its own settlement, is likewise restricted. Thus if CBS prevails in its own lawsuit, it will have established that the provisions of the NBC Consent Decree about which it complains are not valid, and such provisions will not take effect.

7. See Sections II and III, *infra*.

II. THE DISTRICT COURT'S APPROVAL OF THE NBC CONSENT DECREE WAS A PROPER EXERCISE OF DISCRETION.

CBS' petition is particularly inappropriate, considering that decisions of the District Court approving consent decrees terminating government antitrust cases are traditionally discretionary, with virtually no role even for appellate review, let alone extraordinary review by mandamus.

This Court long has recognized that the role of the Courts in passing on settlement agreements in Government antitrust cases is extremely limited. The Court explicitly stated in **Sam Fox Publishing Co. v. United States,** 336 U. S. 683, 689 (1961):

> "[S]ound policy would strongly lead us to decline . . . to assess the wisdom of the Government's judgment in negotiating and accepting the . . . consent decree, at least in the absence of any claim of bad faith or malfeasance on the part of the Government in so acting." [8]

Contrary to CBS' suggestions, this long-standing rule has not been altered by passage of the APPA. The intent of Congress in passing that statute was to create the equivalent of a "sunshine law" for consent decree approval proceedings.[9] In the words of Senator John Tunney, one of the bill's sponsors, it was his expectation that "the consent decree process will be opened up to public scrutiny and judges will take a more active role in assessing the

8. No claim of bad faith or malfeasance has been made in this case.

9. The procedural aspects of the APPA, and the objections of CBS to the procedures used by the District Court here, are discussed in Section III, *infra*.

worth of the proposed judgments." These comments, made in the context of legislative discussion of the allegedly tainted IT&T settlement, clearly were directed at the "bad faith or malfeasance" exception of **Sam Fox,** not to any wholesale involvement of the Courts in the details of settlements. 120 Cong. Rec. S 20862 (daily ed. Dec. 9, 1974). There is, no indication at all in the statutory history that Congress intended to alter the judiciary's limited role in approving consent judgments.[10]

This is exactly the view taken by the courts under the APPA. In **United States v. Associated Milk Producers, Inc.,** 393 F. Supp. 29 (W. D. Mo. 1975), *aff'd,* 534 F. 2d 113 (8th Cir. 1976), *cert. denied sub nom.,* **National Farmers Organization v. United States,** 429 U. S. 940 (1976), the District Court reexamined actions taken prior to the APPA and found them consistent with the Act. In making its public interest determination, the Court held:

> "A court's powers to do very much about the terms of a particular decree, even after it has given the decree maximum, rather than minimum, judicial scrutiny, is a decidely limited power. *See* **United States v. Ward Baking Co.,** 376 U. S. 327, 84 S. Ct. 763, 11 L. Ed. 2d 743 (1964). Power to reform the procedures under which consent decrees are actually negotiated is invested in the executive and legislative branches, not the judicial. And, if Congress wants the judicial branch to have more power than that implicit in a threat of total rejection of a proposed decree, such power must be authorized by legislation which is considerably broader in scope than that vested by the newly enacted Antitrust Procedures and Penalties Act or by existing law." 394 F. Supp. at 42. *See* **United States v. Gillette Co.,** 406 F. Supp. 713, 716 (D. Mass. 1975): "The Court is not settling this case. It is determining whether the settlement is within the reaches of the public interest."

10. CBS in its present petition (p. 13) poses a hypothetical case in which a district court chooses to approve a consent decree which it expressly finds not to be in the public interest. Clearly no rule of appellate review need be developed to deal with so far-fetched a situation. Suffice it to say, for present purposes, that the District Court's extensive opinion setting out its reasons for holding approval of the NBC Consent Decree to be in the public interest is exactly the type of explanation which Congress intended as sufficient action by the district judge.

Here, after precise compliance with the APPA's required procedures, the District Court concluded that it had before it a reasonable compromise. On the one hand, program suppliers argued that the Consent Decree was not sufficiently restrictive; on the other, CBS maintained that it was *too* restrictive and that the underlying lawsuit was without merit. It can hardly be contended that, in passing the APPA, Congress intended to interfere with the District Court's long standing discretionary power to approve reasonable compromise settlements entered into by the parties after appropriate public disclosure.

It also bears emphasis that nothing in the APPA history supports a claim for appellate involvement, whether by mandamus or otherwise. The APPA itself makes absolutely no provision for appellate review by the Court of Appeals, something Congress readily could have provided had it so intended.

III. THERE IS NO VALID BASIS FOR OBJECTING TO THE PROCEDURES UTILIZED BY THE DISTRICT COURT.

CBS suggests that the District Court somehow erred because it failed to hold an evidentiary hearing. However, there is no such requirement under the APPA. The decision whether to hold a hearing, or to utilize any of the other like procedures available under the APPA, was within the discretion of the District Court.[11]

Subsection (f) of the APPA, 15 U. S. C. § 16(f) (App. 5a-6a), provides that in making its determination of whether a consent decree is in the public interest, a district court *may* utilize various procedures, including the holding of a hearing and the taking of evidence. Congress clearly did not intend that a district court be required to utilize these procedures when the court did not deem it necessary to do so. In fact, Congress intended exactly the opposite. The Senate Judiciary Committee made clear that:

> "It is not the intent of the Committee to compel a hearing or trial on the public interest issue. *It is anticipated that the trial judge will adduce the necessary information through the least complicated and least time-consuming means possible.* Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, this is the approach that should be utilized. Only where it is imperative that the court should resort to calling witnesses for the purpose of eliciting additional facts should it do so.

11. There is no question that the APPA's mandatory procedures, such as notice and publication of the Consent Decree, were satisfied.

> Nor is § 2(e) intended to force the government to go to trial for the benefit of potential private plaintiffs . . . ." Senate Report, 93-298, at 6 (Emphasis supplied).

In a similar vein, Rep. Barbara Jordan said:

> "It is not the intention of the committee to require the courts to conduct a hearing or trial on the public interest question. *It is anticipated the trial judge will adduce the necessary information through the least complicated and least time-consuming means possible.*" 120 Cong. Rec. 36344 (1974). (Emphasis supplied.)

And the bill's manager, Rep. John Seiberling, explicitly stated that a district court has no obligation to utilize any of the procedures provided by the Act:

> ". . . the bill expressly provides that while the court *does not have any mandatory requirement* to make further inquiries, it has the specific authority to do so, an authority which it now has under its general equity powers but which is spelled out in the proposed legislation along with some explicit statutory guidelines." 120 Cong. Rec. 36342 (1974). (Emphasis supplied.)

Under these circumstances, appellate review of the particular procedures which a district judge feels should be utilized in a given consent decree approval proceeding of necessity must be extremely limited. Where, as here, a district court has had the opportunity to review extensive comments and affidavits, it is peculiarly within the court's discretion whether an evidentiary hearing, the appointment of a special master, consultation with experts,

or any of the other procedures permitted under the Act are of any utility in the matter before it. *See* **United States v. American Milk Producers, Inc.**, *supra;* **United States v. Gillette Co.**, *supra.* Hence no procedural issue arises meriting review.

CONCLUSION.

For the foregoing reasons, CBS' petition for a writ of certiorari should be denied.

Respectfully submitted,

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